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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1232

JOHN M. CLEARY,

Petitioner,

v.

O. ROY CHALK, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The question to be reviewed by this Court, in determining whether a writ of certiorari should be issued in this case, is whether the Court of Appeals for the District of Columbia Circuit ("Court of Appeals") in affirming the finding of the District Court, in an action brought by a member of the farepaying public, that transfers of non-operating property from a regulated carrier to its wholly-owned subsidiaries, without competitive bidding, under the circumstances herein, did not

constitute violations of Section 10 of the Clayton Act, 15 U.S.C. §20 (1970) raises either an important federal question, which has not been, but should be settled by this Court, or creates a conflict with decisions of this Court.

PRELIMINARY STATEMENT

Petitioner ("Cleary") has requested this Court to issue a writ of certiorari to review the judgment of the Court of Appeals entered in this proceeding on November 12, 1973. The Court of Appeals affirmed the order of the United States District Court dismissing, for failure to state a claim upon which relief could be awarded, Cleary's complaint that the transfer by respondent D.C. Transit System, Inc. (D.C.), without competitive bidding, of certain non-operating property to wholly-owned subsidiary corporations, constituted a violation of Section 10 of the Clayton Act.

STATEMENT OF THE CASE

Cleary, a District of Columbia attorney, brought an action as a member of the bus riding public, "on behalf of himself and all ratepayers as a class" (Complaint, ¶2(b)) against D.C. Transit System, Inc. (a Delaware corporation), its wholly-owned subsidiary, D.C. Transit System, Inc. (a District of Columbia corporation) and six of its wholly-owned subsidiaries and nine individuals, who are officers and directors of those corporations. (All references herein to "D.C. Transit" shall refer to D.C. Transit System, Inc. (D.C.), unless specifically noted otherwise).

Transactions at issue

Between September 30, 1958 and July 31, 1964, D.C. Transit, with the approval of the regulatory agency which

had jurisdiction over it, removed from service six parcels of real estate and transferred those properties to non-operating status.[1] Subsequently each of these properties was transferred to a separate corporation for all of the stock of such corporation, in tax-free exchanges within the meaning of Section 351 of the Internal Revenue Code of 1954, as amended ("Transactions").

Complaint

The Complaint alleges that the Transactions constituted violations of Section 10 of the Clayton Act, and "gave rise to actions for treble damages pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15." (Complaint, ¶ 20).

The Complaint further alleges that the transfer of real property to its wholly-owned subsidiaries resulted in damages to D.C. Transit and to "the ratepayers and the public relying upon the services and financial stability of the carrier in that they were (a) deprived of assets for less than their fair value; (b) deprived of the earning power which these assets had and continue to have; (c) were deprived of the value of these assets for the purpose of hypothecation or use as collateral in obtaining loans to assure the financial stability of the carrier." (Complaint ¶ 18).

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[1] These transactions were all considered by the Washington Area Transit Commission ("WMATC") as they relate to rate-making and approved. (*See* WMATC Order No. 1090, *D.C. Transit System, Inc.*, 85 P.U.R. 3d 508 (WMATC 1970)). Cleary, appealed from this Order to the Court of Appeals, *Cleary v. WMATC*, No. 24,635 (D.C. Cir., filed Sept. 17, 1970), but failed to file a brief therein. On June 7, 1971, more than six months thereafter, and after the Court of Appeals had issued an Order to Show Cause why that appeal should not be dismissed, the defendants therein moved to dismiss Cleary's appeal, *with prejudice*, for lack of prosecution. This motion was granted by the Court of Appeals on June 10, 1970. No petition for a writ of certiorari was filed with this Court to review the order granting the motion to dismiss.

The Complaint then demands relief in the form of:

(1) restoration of the *status quo ante* these transactions, plus restoration to the carrier (D.C. Transit) of all earnings generated by those assets (with no specification of time period);

(2) payment by defendants to D.C. Transit of treble damages allegedly sustained by it; and

(3) costs and expenses, including legal and accounting fees, and unspecified "further relief."

The Complaint demands that all damages be paid to D.C. Transit, of which Cleary is not a stockholder. The Complaint does not seek damages to be paid to the class of farepayers of which Cleary alleges that he is a member. Cleary neither alleges nor argues that if such a recovery were granted, it would in any manner affect the bus fares which he must pay. The damages demanded do not purport to be class action damages and cannot redound to the benefit of either Cleary or his purported class of farepayers.

Decision of the Court of Appeals

In affirming the order of the District Court dismissing the Complaint for failure to state a cause of action, the Court of Appeals concluded that the Transactions complained about were not within the prohibitions of Section 10 of the Clayton Act. In so doing the Court of Appeals found as follows (Cleary Appendix, p. 15a):

(a) D.C. Transit was not deprived of assets for less than market value because D.C. Transit did not dispose of them and the post-transfer value of the stock of the transferee wholly-owned subsidiary corporations was equal to the value which the properties would have possessed had they remained owned directly by D.C. Transit.

(b) D.C. Transit was not deprived of the earning power of the assets because the earnings of the

transferee wholly-owned subsidiary corporations were the earnings of their parent, D.C. Transit, and the financial statement of D.C. Transit and these subsidiaries were consolidated for purposes of financial transactions.

(c) D.C. Transit was not deprived of the value of these assets for use as collateral to assure its financial stability and indeed certain of the properties were mortgaged to secure loans to support transportation operations.

(d) Even if the Transactions had fallen within the prohibition of Section 10 of the Clayton Act, the absence of injury to Cleary or other farepayers would be fatal to Cleary's action.

The Court of Appeals concluded that it could not "perceive any set of facts which would sustain the specific claim asserted in [Cleary's] complaint." (Cleary Appendix, p. 18a).

Clayton Act

Since the Clayton Act is at issue in the proceeding, it is worthwhile to review briefly its purposes and history. As pointed out in the opinion of the Court of Appeals, Section 10 of the Clayton Act was enacted as a result of considerable public outcry over abuses resulting from conflicts of interest arising from interlocking directorates among railroads and their suppliers and bankers shortly after the turn of the century.[2] Specifically, the abuses concerned the dissipation of the railroads' assets through purchases by railroad at exhorbitantly high prices, issuance of railroad securities at unreasonably low prices, and loans to railroads at excessive rates of interests.

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[2]Cleary Appendix, p. 10a.

Section 10 had its impetus in President Wilson's message to Congress of January 20, 1914 when he proposed "laws which will effectually prohibit and prevent such interlockings of the personnel of the directorates of great corporations." 51 Cong. Sec. 1963 (1914). The principal concern regarding this legislation was the diversion of a carrier's assets, at less than fair market value, to other business entities in which individuals holding an important position with the carrier had a property interest.[3] Neither Respondents nor Cleary dispute that the above described purpose was the purpose of Section 10. *Minneapolis & S.L. Ry. v. United States*, 361 U.S. 173, 190 (1959).

Obviously, Section 10 does bar some dispositions and acquisitions by carriers in transactions between corporations with interlocking directors. Logic places limitations on the business activities Section 10 are to govern, and such limitations are to be determined by the evil Congress intended to control. It is clear from the language of the statute that the evil sought to be prevented is the draining away of carrier assets to the benefit of personal interests.

In short, the intent of Section 10 is to prohibit diversions of a common carrier's assets by individuals in positions of control within the carrier who stand to profit personally from transactions that are disadvantageous to the carrier itself.

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[3]*See Five Percent Case*, 31 I.C.C. 351 (1914); *Financial Transactions of the New York N.H. & H.R.R.*, 31 I.C.C. 32 (1914).

ARGUMENT

I.

CLEARY HAS NOT ESTABLISHED ANY GROUNDS FOR THE ISSUANCE OF A WRIT OF CERTIORARI

A. Contrary to Cleary's argument, none of the issues decided by the Court of Appeals represents an important question of federal law which has not been, but should be, settled by this Court.

Cleary has failed to establish any grounds under United States Supreme Court Rule 19, 28 U.S.C. 19 justifying the issuance of a writ of certiorari in this proceeding. Contrary to Cleary's argument, the facts herein do not support a finding by this Court that the decision of the Court of Appeals in this proceeding presents an important question for review.

In this case, all that the Court of Appeals decided was the applicability of Section 10 of the Clayton Act to a particular set of facts. Cleary erroneously argues that the effect of this decision requires review. Cleary's argument is noticeably unsupported by any authority justifying his conclusion.

The Complaint was based on the theory that Section 10 prohibits a carrier from transferring non-operating properties to a wholly-owned subsidiary without competitive bidding. The Court of Appeals decided that Cleary's theory was without merit. It is clear that the decision of the Court of Appeals does not rise to the level of importance necessary in order for this Court to grant review and that it is not comparable to the level of importance of the cases in which this Court has granted review. *See United States v. Coleman*, 390 U.S. 599, *reh. denied*, 391 U.S. 961 (1968); *American Federation of Musicians v. Wittstein*, 379 U.S. 171 (1964); *United States v. Ruzicka*, 329 U.S. 287 (1946); *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946).

As stated in the opinion of the Court of Appeals (Cleary Appendix, p. 6a), this proceeding involves the sole question of whether the Transactions complained about fell within the prohibition of Section 10. Cleary argues that this issue has not previously been before this Court, and therefore should be settled by this Court in this case. Review is normally not granted merely for novel or interesting issues; generally something more must be shown to raise the case to the level of importance required by United States Supreme Court Rule 19.[4] The issue of the applicability of Section 10 to prohibited transactions is not only clear from the overt intentions of Congress, but the issue has been presented to this Court in the past. The decision of the Court of Appeals in the instant proceeding conforms to the interpretation of Section 10 which was established by this Court in *Minneapolis & S.L. Ry., Co. v. United States, supra.* Cleary's argument that the decision of the Court of Appeals in this proceeding involves a question which has not been, but should be, settled by this Court, is without merit.

Finally, Cleary goes to great lengths to argue (Petition pp. 8-10, 13) that the effect of the Court of Appeals' decision below compels review by this Court. Contrary to this contention, the net effect of the Court of Appeals' decision is nil because the only thing the decision does is to reaffirm this Court's position that the applicability of Section 10 is limited to "activity that is conceptually within the antitrust philosophy." *United States v. Boston & M.R.R.*, 380 U.S. 157, 162 (1965).

Section 10 was enacted to do away with the evil of carriers, under certain circumstances, selling off their assets so as to net little or no gain, and thereby reduce their net worth. Under Cleary's narrowly drawn facts, the Court of Appeals found D.C. Transit to have suffered no

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[4]STERN & GRESSMAN, *Supreme Court Practice*, p. 170 §4.13 (4th Ed. 1969).

loss through the Transactions, but rather "in the practical sense Transit's position hardly changed at all." (Cleary Appendix, p. 14a).

In the instant proceeding below the Court of Appeals properly found that the specific transactions, under the special circumstances herein, were not within the scope of the prohibitions of Section 10. The effect of that decision certainly does not raise an issue compelling settlement by this Court within the meaning of the "important question" test for purposes of United States Supreme Court Rule 19.

B. Contrary to Cleary's argument, the decision of the Court of Appeals does not create a conflict with decisions of this Court

It is argued by Cleary (Petition pp. 14-15) that review should be granted because the decision by the Court of Appeals is in "direct conflict" with decisions of this Court. Cleary has not alleged that the decision of the Court of Appeals herein conflicts with decisions of any of the United States Courts of Appeals for other circuits.

The assertion by Cleary that the decision of the Court of Appeals herein conflicts with decisions of this Court is based upon the Court of Appeals' analysis of the Transactions and the relationship between D.C. Transit and its wholly-owned subsidiaries. The Court of Appeals found as follows:

> "One feature of the conveyances stands out indelibly. Each was made to a corporation in exchange for all of its capital stock. And both at the time of conveyance and at the time of suit, each corporate conveyee was a wholly-owned subsidiary of Transit. To be sure, the conveyances effected a legal transformation of Transit's ownership of real estate to ownership of stock, but in the practical sense Transit's position hardly changed at all. Its

> complete ownership of the stock of the corporations having direct ownership of the realty was tantamount to continuing proprietorship of the realty. By virtue of its exclusive power to control the subsidiaries, Transit retained full dominion over the properties. Its economic relationship to the properties after the conveyances was virtually the same as it had been before." (Footnotes omitted) (Cleary Appendix, pp. 14a to 15a).

Cleary argues (Petition p. 14) that the Court of Appeals did "not have the choice of disregarding the corporate entity." Cleary erroneously cites *Schenely Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946) and *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 23-24 (1940) as decisions of this Court with which the decision of the Court of Appeals herein conflicts. In so mis-citing those cases, Cleary glosses over the circumstances and questions at issue in those cases which led this Court to decide in those cases that stockholders of a corporation could not disregard the corporate entity.

The purpose of this Court's decisions in both *Schenley* and *Klein* was to decide whether the corporate veil should be pierced and whether certain rights belonging to a corporation should be attributed to stockholders of a corporation. In this case, the Court of Appeals was presented with a question dealing with the nature of ownership of assets, *i.e.* whether there was a material difference for purposes of the Clayton Act between the case of a corporation owning certain property directly and the case of the same corporation owning all the shares of stock of a subsidiary corporation which in turn owned the very same property. The question of whether a corporate veil should be pierced played no part in the decision of the Court of Appeals herein. Rather, the decision of the Court of Appeals herein merely determined whether there had been a material change in the *extent* of the ownership interest which D.C. Transit had when it transferred property to wholly-owned subsidiaries. It was the *extent* of the ownership interest and

not the *form* of the ownership interest which the Court of Appeals concerned itself with in this case.

It is therefore submitted that neither *Schenley* nor *Klein* is authority supporting Cleary's position that the Court of Appeals' decision creates a conflict with prior decisions of this Court. Therefore, Cleary's request for a writ of certiorari should be denied.

II.

THE FINDING OF THE COURT OF APPEALS THAT THE TRANSACTIONS COMPLAINED OF DID NOT FALL WITHIN THE PROHIBITION OF SECTION 10 OF THE CLAYTON ACT IS CORRECT

A. Section 10 was not intended by Congress to apply to transactions such as those alleged in the complaint

There does not seem to be any dispute among the parties as to what was the intention of Congress in enacting the Clayton Act. As cited by Cleary (Petition p. 12), this Court has previously stated the Congressional intent as to Section 10 as follows:

> "The evident purpose of §10 of the Clayton Act was to *prohibit a corporation from abusing a carrier by palming off upon its securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors*, to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest." *Minneapolis & S.L. Ry. v. United States*, 361 U.S. at 190 (Emphasis supplied)

The statute explicity limits the fashion in which a carrier may deal with any other business entity in which one of its directors, officers or agents is personally interested. This determining factor of personal interest is borne out by the use in Section 10 of the language "has a substantial interest in" to delineate the extent of involvement in other business organizations by carrier personnel

which is required in order to bring the transaction within the purview of the statute. The evil sought to be prevented by the statute is the draining away of carrier assets to the benefit of such personal interests.

That evil is not present in this case.[5] Here the corporations to which the property was transferred by D.C. Transit were wholly-owned subsidiaries of D.C. Transit. Here no individual has or could have profited from the Transactions either directly or indirectly, through any "interest" in the subsidiary corporations which were and are wholly-owned subsidiaries of D.C. Transit. Moreover, in the instant case, D.C. Transit has not been deprived of any assets whatsoever. The financial position of D.C. Transit after the transfers remained *exactly* the same in substance as its position before, and it continues to own and exercise complete control over the transferred assets. This internal corporate rearrangement, from which no detriment to the carrier conceivably arises, was not intended by Congress to fall within Section 10. *cf. Minneapolis & S.L. Ry. v. United States, supra.*

Furthermore, this Court in *United States v. Boston & M.R.R., supra,* in reviewing a criminal case brought under Section 10, stated:

> "While history shows a rather wide pattern of railroad misconduct leading to § 10, that section is a rather narrow prohibition applicable to activity that is conceptually within the antitrust philosophy." 380 U.S. at 162.

No adverse effect on competition or commerce could conceivably have arisen from these Transactions, alleged

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[5] Cleary devotes the largest part of his argument to his concern that D.C. Transit might distribute the wholly-owned transferee subsidiary corporations to its shareholders as a dividend in a so-called "spin-off". Cleary shows no relevance of this dividend argument to Section 10 of the Clayton Act.

by Cleary to violate Section 10. No attempt at monopolization and no restraint of trade is alleged by Cleary or appears from the facts alleged. Nor is any conspiracy to effect such monopolization or restraint of trade alleged nor does it appear from the facts alleged. There has been no activity alleged here which could be even remotely construed as "conceptually within the antitrust philosophy."

Section 10 was never intended by Congress to regulate or prohibit transactions such as these, and it is accordingly not applicable.

B. In the Transactions complained of, D.C. Transit did not act as a "common carrier engaged in commerce" within the meaning of Section 10

A violation of Section 10 carries criminal penalties and, under Section 4, civil liability to and damages for a proper plaintiff who has been injured in the manner required. Section 10 does not prohibit the Transactions complained of here, and this becomes especially clear when the statute is read strictly, as a criminal statute must be.[6]

The acts prohibited by Section 10 are those of a "common carrier engaged in commerce." From the use of the term "common carrier" without definition, and from the delegation of authority to the Interstate Commerce Commission ("I.C.C.") to oversee such transactions, it is clear that Congress intended Section 10 to provide further regulation of the operations of a common carrier when it operates or acts as such, *i.e.*, when it operates or acts in the transportation of passengers and goods for hire.

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[6] *United States v. Boston & M.R.R.*, 380 U.S. at 160 n. 37.

The term "common carrier engaged in commerce," as used in Section 10, does not encompass the Transactions complained of herein between D.C. Transit and its subsidiaries. These Transactions involved properties which had *previously* been removed from D.C. Transit's common carrier business as being no longer used or useful in its common carrier operations and thereafter such properties were no longer involved in D.C. Transit's transportation operations nor in the computation of fares. (*See D.C. Transit System, Inc.* (Order No. 1090) 85 P.U.R.3d 508 (WMATC 1970)). The decision of the WMATC dealing with the substance of the subject Transactions between D.C. Transit and its wholly-owned subsidiaries was appealed by Cleary to the Court of Appeals and then that appeal was not prosecuted by Cleary. *See* Note 1, *supra.* If Cleary wanted to challenge the decision of the WMATC, he should not have abandoned his prior appeal therefrom. He cannot here and now collaterally attack that decision.

In transferring these properties to its wholly-owned subsidiaries, D.C. Transit was not acting as a "common carrier" in the statutory sense, but was engaged in non-carrier business activities involving assets unrelated to the common carrier aspects of its business. The term "common carrier" in Section 10 does not extend to transactions so removed from the carriage of passengers and the protected public interest therein.

Furthermore, Congress delegated to the I.C.C. the responsibility for supervising any transactions to which Section 10 applied. The jurisdiction of the I.C.C. over all carriers and persons subject to the provisions of the Washington Metropolitan Area Transit Regulation Compact (including D.C. Transit) has been transferred to the WMATC. District of Columbia Code §1-1412 (1967). Thus the WMATC has assumed the function of the I.C.C. as guardian of the public interest herein and is charged, as the I.C.C. is, with balancing all factors of public interest.

including the antitrust laws, in its determinations. Here, the WMATC has considered and consistently approved the Transactions and D.C. Transit's treatment of them. (*See, e.g.*, WMATC Order No. 981, (Oct. 17, 1969) *D.C. Transit System, Inc.*, 81 P.U.R. 3d 113 (WMATC 1969)). The WMATC has also had its staff, at Cleary's request, investigate the possibility of violations of Section 10; they have found "no evidence of violations." Cleary does not allege that the WMATC is wrong and indeed has abandoned his appeal from the Commission's Order No. 1090, *D.C. Transit System, Inc.*, 85 P.U.R.3d 508 (WMATC 1970). The view of the WMATC, the arbiter of the public interest in these matters, must prevail over the fanciful and discredited allegations made by Cleary.[7]

C. The Transactions complained of did not constitute "dealings in securities" between D.C. Transit and its wholly-owned subsidiaries or dealings with "another corporation" within the meaning of Section 10

In *Minneapolis & S.L. Ry. v. United States, supra*, the only occasion when the securities provision of Section 10 was before this Court for consideration, the Court noted:

> "The legislative history of §10 of the Clayton Act, though meager, supports the view stated in the text. In fact, the language of the several drafts of §10, together with the types of abuses cited in support of its enactment, suggests strongly that the words 'dealings in securities' were intended to cover *only* a carrier's dealings with related persons *in its own securities*." 361 U.S. at 190 n. 13. (Emphasis supplied)

[7]Indeed, Section 10 delegates to the I.C.C. (the WMATC in the case at bar) the authority to prescribe regulations under Section 10. Order No. 1090 *D.C. Transit System, Inc.*, 85 P.U.R. 3d 508 (WMATC 1970), is in the nature of such a regulation, determining the transactions to be outside the coverage of Section 10.

In *Klinger v. Baltimore & O.R.R.*, 432 F.2d 506 (2nd Cir. 1970), a recent judicial expression on Section 10, this characterization of legislative intent is presented forcefully by Judge Henry Friendly in his concurring opinion, wherein, in commenting upon the Court's finding of a violation of Section 10, he characterized Section 10 as "a narrowly drawn statute designed to meet a particular set of experienced evils" (432 F.2d at 516) and wherein he described the securities provision of Section 10 as "limited to sale of a carrier's own securities--the evil at which Section 10 was aimed" (432 F.2d at 518).

Klinger involved the purchase by the B & O Railroad of the Reading Railroad's stock interest in a produce terminal corporation, which the two railroads had previously owned jointly. The B & O dominated the Reading through ownership of 42% of its common stock and the two railroads had three common directors. A derivative action was brought by minority shareholders of Reading under Section 4 of the Clayton Act, alleging violations of Section 10 in that the B & O purchased securities in the produce terminal company from Reading at a value below that of a half interest in the underlying terminal property. The trial court found a violation of Section 10 and consequent damages to the Reading, and awarded treble these damages to the Reading. The Second Circuit reversed this decision and remanded, with instructions that the complaint be dismissed, each appellate judge writing a separate opinion. Chief Judge Lumbard, in the main opinion, found a violation of Section 10, but no injury. Judge Friendly, in a concurring opinion, agreed that the complaint should be dismissed, but found no violation of Section 10 and thus no basis for the action.

Judge Lumbard held that the transaction in *Klinger* was a "dealing in securities" within the prohibition of Section 10, arguing that Section 10 should be read broadly enough to include such a transaction, even though the carrier allegedly suffering damage (Reading) was not dealing in its own securities.

The transaction in *Klinger* involved a *sale* by the carrier and a *purchase* by another corporation. Reading and B & O were separate business organizations, with *different* ownerships, and the transaction involved the passage of ownership and control of an asset used in carrier business, represented by securities, from one corporate organization owned by one group of interests to another corporate organization owned by different interests.

However, this broadened construction of Section 10, relied upon by Cleary, is not applicable in this proceeding. All the Transactions were between D.C. Transit and wholly-owned subsidiary corporations in exchange for all of the capital stock of the subsidiaries. As the transferee corporations were, at the time of conveyance and the institution of this action, wholly-owned subsidiaries of D.C. Transit, the net effect was a change in the *form* of ownership of the properties by Transit, with no real effect on Transit's position.[8] As a result of complete ownership of the capital stock of the corporations which had ownership of the properties, Transit, in effect continued to own the properties.[9] The fact that no economic change occurred in the instant case is evidenced by the fact that the transfers were tax-free (*i.e.* nontaxable) under Section 351 of the Internal Revenue Code and by the WMATC in its Order No. 1090.

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[8] As put by the Washington Metropolitan Area Transit Commission in dealing with Cleary's petition for reconsideration.

> "[T]he properties in question here have not been sold. They have been placed in non-operating status and their title has been transferred to subsidiary companies, but those subsidiaries are wholly owned by Transit. Thus Transit continues to own the property just as it always has. The only change is that the ownership occurs through holding all of the stock of the company having title, rather than retaining title directly."

D.C. Transit System, Inc. (Order No. 1090), *supra*.

[9] Compare *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 607-08 (1945); *Kimberly Coal Co. v. Douglas*, 45 F.2d 25, 27 (6th Cir. 1930); *Socony-Vacuum Oil Co. v. Sheehan*, 50 F. Supp. 1010, 1012 (E.D. Mo. 1943), *appeal dismissed*, 144 F.2d 252 (8th Cir. 1944).

Section 10 by its terms regulates dealings by a carrier with another corporation, where there are common directors, officers, or agents. Cleary states in his Petition:

> "The purpose of Section 10 of the Clayton Act is the prevention of mulching of a carrier's assets by its officers, directors, or employees through a device of causing the carrier to make contracts upon exhorbitant or unfavorable terms with other corporations or firms in which such officers, directors, or employees *have personal interests greater than their interests in the carrier.*" (Petition pp. 11-12) (Emphasis supplied)

The simple fact is that there are no "other corporations or firms in which such officers, directors, or employees have personal interests greater than their interests in the carrier." Indeed, none of them have or could have an interest in the subsidiaries of D.C. Transit greater than their interest in D.C. Transit since each of these subsidiaries was wholly-owned by D.C. Transit. Cleary has noticeably avoided citing any instances of such interests in his Petition.

In the instant case, there is no claim by Cleary that the transferee wholly-owned subsidiary corporations were independent of D.C. Transit and there is also no claim of misconduct. Everything that was done by the common directors of the transferee subsidiary corporations was done on behalf of D.C. Transit, at its instructions and for its benefit. These wholly-owned subsidiaries were merely shells or nominee holders and not "another corporation" within the meaning of Section 10. There has been no surrender by D.C. Transit of control or ownership of these assets.

Cleary argues that D.C. Transit is bound by the form which the transfer took and cannot escape liability under Section 10, regardless of the substance of the Transactions (Petition p. 13), citing *Klinger v. Baltimore & O.*

R.R., supra. In *Klinger*, there was a divestiture of the carrier's assets to an independent party owned by different interests and the court, having found a violation, was not to be persuaded that it should be ignored because *another form* for the transaction *might* have been used. In the instant case, there was not divestiture or surrender of assets to any other ownership interests, and the form used for the Transactions does not fall within the intent or language of Section 10.

Since there was no dealing with "another corporation", within the meaning of that term as used in Section 10, there was no violation of Section 10 here.

III.

CLEARY HAS NOT ESTABLISHED HIS STANDING TO BRING SUIT UNDER SECTION 4 OF THE CLAYTON ACT

A. Cleary failed to establish specific injury by reason of the Transactions complained of other than injury suffered as a member of the farepaying public.

Cleary has brought this action based on the jurisdiction established under Section 4 of the Clayton Act. Section 4 authorizes an action for treble damages by a "person . . . injured in his business or property by reason of [conduct] forbidden in the antitrust laws." Therefore, Cleary must establish that he has sustained injury to "business or property", *i.e.*, commercial interests or enterprises.

Cleary's only allegations of injury in the Complaint (¶ 8) claim damages to the carrier and thus to himself and his fellow bus riders. This is clearly not sufficient injury to allow Cleary to prosecute this action under Section 4, which requires injury "in his business or property" and allows recovery of "damages by him sustained."

In *Beegle v. Thomson*, 138 F.2d 875 (7th Cir. 1943), *cert. denied*, 322 U.S. 743 (1944), an action was brought under Section 4 of the Clayton Act alleging violation of several provisions of the antitrust laws. The court, in affirming the dismissal of the complaint, stated in regard to Section 4 that in:

> "... allowing private parties treble damages for injury accruing to their business from violation of the Anti-Trust Act, embraces, as one of the essentials to such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. *Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential.* The manner, nature, character and extent of the injury sustained and the facts from which injury accrues and upon which damages may be assessed as well as those with regard to the effect of the alleged violation upon plaintiff's business, must be pleaded. The mere existence of a violation is not sufficient *ipso facto* to support the action, for no party may properly seek to secure something from another *without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act.*" 138 F.2d at 881 (Emphasis added)

Under the above-quoted construction of Section 4, Cleary has no standing to bring the instant suit.

Cleary purports to bring this action on behalf of himself and all public ratepayers as a class. In *Revere Camera Co. v. Eastman Kodak Co.*, 81 F. Supp. 325 (N.D. Ill. 1948), the court specifically held that a private individual has no right under the Clayton Act to bring an action on behalf of the public. In that case, plaintiff alleged that defendants had violated the antitrust laws and therefore brought an action under Sections 4 and 16 of the Clayton

Act for treble damages on behalf of itself and the public. The court granted defendants' motion dismissing plaintiff's claims on behalf of the public and of others, stating:

> "There is nothing in this statute [Section 4] authorizing a private person to bring suit on behalf of the public or others for violation of the anti-trust laws and to obtain relief therefor. . . . [A] suit may not be maintained by a private person merely because of violations of the anti-trust laws which have resulted in injury to the public. On the contrary a plaintiff must allege and prove that these violations have been the approximate cause of *special injury to his business or property*, as distinguished from injury resulting to the public generally." 81 F. Supp. at 330 (Emphasis added)

Section 4 provides for an individual to bring an action for damage to his business or property and allows recovery for these specific injuries. Under the *Revere Camera* case, Cleary's pleadings are fatally defective. Inasmuch as an action by an individual can only be brought for specific injuries to that individual and actions on behalf of the general public can only be brought by the Attorney General, Cleary's action on behalf of the farepaying public must fail.

Finally, Section 4 requires the damage complained of to stem from, or be a consequence of a violation of the antitrust laws. Cleary has failed to establish that his alleged damage is a consequence of the Transactions complained of and that the Transactions are a violation of the antitrust laws.

In *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955), the court discussed at length this very point. The Court held that under the Clayton Act the right to bring an action under Section 4 arises "by reason of the wrongful acts."

Most important, the critical issue is that Cleary has not substantiated that the Transactions have injured him personally and that such Transactions are within the prohibition of Section 10.

B. Cleary failed to allege or establish injury to his business or property as required by Section 4.

Section 4 of the Clayton Act provides that actions may be brought by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. The term "business or property" as used in Section 4 of the Clayton Act has been construed by the courts in its ordinary sense and denotes a *commercial* or *industrial* enterprise or establishment.

In *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2nd Cir. 1970), *cert. denied*, 401 U.S. 923 *reh. denied*, 401 U.S. 1014 (1971), plaintiff brought an action based on Section 4 of the Clayton Act. The Court of Appeals for the Second Circuit, in affirming the District Court's dismissal of the complaint, held that a plaintiff under Section 4 of the Clayton Act must show damage as a direct, rather than an incidental effect of the antitrust activity. The Appellate Court stated:

> "... While any anti-trust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers, it has long been held that not all of these have the requisite standing to sue for treble damages and thereby take a leading role in the enforcement of the prohibition in question. See *e.g.*, *Data Digests, Inc. v. Standard & Poor's Corp.*, 43 F.R.D. 386 (S.D.N.Y. 1967).
>
> "... Consequently, a plaintiff must allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendants illegal act." (Citations omitted) 431 F.2d at 187.

Under *Billy Baxter, Inc., supra*, the complaint herein must be dismissed.

Cleary here claims standing under Section 4 as a member of the general bus riding public, a mere customer. He has cited no authority or statute which supports his proposition that such a relationship constitutes "business or property" within the meaning of Section 4. Thus, Cleary has not satisfied Section 4 and his Complaint was properly dismissed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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